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WHAT HAS PRIVATE LAW EVER DONE FOR JUSTICE?

*Claudio Michelon**

A. THE VALUE OF PRIVATE LAW RULES OF ALLOCATION

The title's question would strike many a contemporary private law theorist as odd and, interestingly, for two opposing reasons. For some, the question does not invite a single useful answer. There are countless ways in which different private law doctrines and rules could be instrumental to the realization of different aspects of justice and, moreover, the appropriateness of any answer would be highly sensitive to context. Among many other roles it might play, private law is often a part of a scheme for forcefully reallocating goods, it gives social actors incentives ranging from simple nudges serious threats, and it creates structures that allow, or at least facilitate, exchange. Much like the Romans in Monty Python's *Life of Brian*, it turns out that private law does lots. In those roles, private law doctrines and rules can be causally related to a just allocation of resources within society. In the large pool of the multiple ways in which private law can help justice *causally*, it is easy to miss other important ways in which it can do so.

For other private law theorists, the question posed in the title is, at best, peripheral, if not nonsensical. They do not believe the central relationship between private law and justice to be one of usefulness. Rather, private law doctrines seek to *emulate* the normative content of an aspect of justice (i.e. corrective justice) so that, in an

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important sense, private law *is* corrective justice. The important question to ask, they believe, is how well our positive legal doctrines match the normative content of (corrective) justice. Theorists of this ilk are not committed to denying that Private law relates causally to others aspects of justice (say, distributive justice), but many would not think that much would be learned about private law (or its constitutive parts) should those causal relations be fully revealed. So, if in the title's question we qualify justice as "corrective", the question could at best convey a plea for an explanation of how our positive private laws achieve (or fall short of) the task of replicating the normative standards of justice. If in the title's question we qualify justice as "distributive", the question might be an interesting social theory question to ask, but would reveal very little about private law.

In this article, I resist the temptation to dismiss the question for either of those reasons and try to demonstrate that a more focused look at certain traditional private law doctrines and concepts, combined with a closer look at theories of justice, would yield illuminating answers to the question of private law's usefulness to justice. My focus will be in positive private law doctrines and rules concerning allocation of goods and my claim is that the instrumental value they possess *vis-à-vis* justice can be *constitutive*, not merely *causal*, in nature. If that claim were borne by the arguments below, the title's answer would yield a suitably informative (and general) answer.

Let me start with by posing the simple claim that the positive allocation of particular goods to particular people by means of either legal rules or particular legal decisions is instrumental to the realization of a distributively just state of affairs. If we assume that achieving a distributively just state of affairs¹ is valuable, whatever helps bring it about can be safely thought to be instrumentally valuable in relation to that particular end. So such legal rules and decisions are valuable for the sake of something other than themselves: they are a means to achieving a distributively just allocation of goods within a particular social group.

The apparent simplicity of the claim above hides a more complex conceptual

¹ In what follows I shall use the expression "just state of affairs" to refer to a state of affairs that is justified by the right conception of distributive justice, whatever it might be.

and normative hinterland. There is more than one way in which value can be conveyed from something that possesses final value to the means which are conducive to realizing such value. In relation to the particular objects that concern me here, I argue that there are two different ways in which legal rules and decisions might be instrumental in relation to achieving a distributively just state of affairs.²

Yet, one of the ways in which allocative rules and decisions can be instrumentally valuable remains opaque to the current literature on the matter of how value supervenes on private law and its constituent norms, concepts and doctrines. The question of how value supervenes on private law institutions (including rules about allocations of goods) has invited apparently opposing general answers. While the dominant view on the matter of private law's value is that it possesses value of an instrumental kind,³ some, most notably Ernest Weinrib, have defended the thesis that private law (conceived as a system of liability) should not be conceived as if it had a purpose extrinsic to it. As Weinrib famously put it "...[t]he purpose of private law is simply to be private law".⁴ This opposition between private law's 'instrumental' and 'final'⁵ value needs further clarification, as the two ways of being valuable are not

² As we will see in section C below, this claim needs to be qualified, as it only applies to a particular type of distributive criteria, which I term allocation-unbound.

³ Leslie Green makes the point that virtually every contemporary general conception law's value agrees that law possesses instrumental value, in L Green, "Law as a Means", in P Cane (ed), *The Hart-Fuller Debate in the 21st Century* (2010) 169 at 170-171. Specifically in relation to private law, instrumentalism is a central feature of 'Law and Economics' approaches to private law, but it is hardly exclusive to it. The belief that "The norms of private law are purely instrumental, in at least two aspects one pertaining to *value*, the other to *content*" (B Zipursky, "Philosophy of Private Law", in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 623 at 625) is shared with many other approaches to private law. For an overview of private law instrumentalism see J Pojanowsky, "Private law in the gaps" (2014) 82 *FordhamLR* 1705-1712). Neither is this approach new or restricted to the Anglo-American legal tradition. To name but two classical texts in that vein, Otto von Gierke, inspired by Jhering's work, gave the public lecture later published as *Die Soziale Aufgabe des Privatrechts* (1889); 30 years later, K Renner publishes his classical *The Institutions of Private Law and their Social Function* (1929, English translation, 1949).

⁴ E Weinrib, *The Idea of Private Law* (1995) 21.

⁵ Throughout this article I will be using the "instrumentally valuable" and "valuable in itself"(or "finally valuable") to designate, respectively, the quality of being valuable for the sake of something else and the quality of being valuable for its own sake. I will avoid using the expressions "extrinsic" and "intrinsic", as they are ambiguous

mutually exclusive. Something might possess both final value *and* instrumental value if it also furthers the realization of another value. In fact, both kinds of value might supervene on the *same property* possessed by the object. The property of “having being used by Abraham Lincoln to sign the Emancipation Proclamation” makes the gold pen held by the *Beinecke Rare Book and Manuscript Library* valuable in itself (i.e. it possesses final value); and under some conditions, the same property might lend the same gold pen instrumental value, as when it is used as a means to educate children about justice and equality.

Therefore, “valuable in itself” conceptions of the value of private law would pay a high price on plausibility if their proponents were to argue that no instrumental value can ever supervene on particular private law institutions. Whatever “final” value private law (or an aspect thereof) might have, if it also helps to, say, maximize utility (perhaps by preventing harm) or to bring about a state of affairs that is distributively just, it would *also* have instrumental value as a means to achieving a valuable end.

So the claim that the purpose of private law is to be private law is not best understood as a substantive claim about *there being* only one kind of value served by private law and its constituent parts, but rather as a claim about a distinctive feature private law (conceived as a system of liability) possesses: it possesses value *in itself*. Understood in that way, the claim is simply that, whatever else is part of the core concept of private law, one of its *distinctive* features is that its value is non-instrumental.⁶ Private law (*qua* private law) would not be a means to achieve certain state of affairs deemed to be valuable (although it could certainly do so), but instead would be the unpacking of a certain value that such theorists often identify as the value of corrective justice. So, they conclude, private law’s value (*qua* private law), unlike the value of instruments, is not contingent on the inexistence of better means to achieve the relevant final values.

between this meaning and the alternative meaning of “having value that supervenes on a relational property” and “having meaning that supervenes on a non-relational property, as remarked by C Korsgaard in “Two distinctions in goodness” (1983) 92 *Philosophical Review*, 169-195.

⁶ On how this approach could explain private law’s distinctiveness see, for instance, E Weinrib, *Corrective Justice* (2012) at 10-11; 13; and 28.

However that might be, valuable-in-itself conceptions of private law are not concerned with whatever instrumental value private law institutions might possess. For that reason, they do not elaborate much on how private law institutions might be said to be instrumentally valuable. When they discuss candidates for explaining private law as instrumentally valuable, their conceptions of instrumentality are not sufficiently subtle. When discussing the law of delictual liability, they argue against conceiving it as a means to generate negative incentives to behavior deemed to be undesirable.⁷ The instrumental relationship here is conceived simply as one of cause and effect between the law of delictual liability and a certain state of affairs in which fewer tokens of undesirable behavior occur.

This relatively blunt conception of instrumentality is not surprising in corrective justice theories, as it is perfectly sufficient for their proponents to make their point against instrumentalist conceptions of private law. What is more surprising is that theories that focus on private law's instrumental value do not fare better in their understanding of the ways in which value supervenes instrumentally on private law institutions. Their general conception of the instrumentality relation is remarkably similar to the one assumed by corrective justice theorists. It comprises: (i) a state of affairs that is deemed to be valuable (distributive justice, or economic growth, or some other goal); (ii) a certain aspect of private law (say tort rules, or rules about the acquisition of property); and, (iii) a causal relationship is said to obtain between (ii) and (i). This account leaves a lot to be desired, in particular to the understanding of the instrumental value of legal rules and decisions about the allocation of goods to people. In what follows I intend to help remedy this situation by providing a better account of the instrumental value of such rules and decisions.

I start by briefly stipulating what an allocation is for the purposes of my argument (section B) and then move on to discuss criteria that one might use to justify, from the point of view of distributive justice, particular allocations of goods to individuals within the relevant social group (section C). I do not intend to discuss each of the many theories about what constitutes a just allocation of goods within a political community, but instead I shall introduce a distinction between two kinds of

⁷ E Weinrib, *The Idea of Private Law* (1995) at 46-50

criteria used to justify such allocations and, in relation to one of them (the allocation-unbound type), identify an inherent insufficiency that prevents them from performing the job one would normally require from a theory of distributive justice. In section D, I examine different strategies to address this insufficiency and show that, as it turns out, one crucial way in which this can be accomplished is the introduction of *positive* allocations of the kind that is so familiar to property lawyers. With all that in place I then conclude, in section E, by briefly presenting the two distinct ways in which the private law rules and decisions which traditionally allocate particular goods to particular people can be said to be instrumentally valuable to the realization of distributive justice.

B. WHAT IS AN ALLOCATION?

An “allocation” is a pairing between a particular good and a particular person. It establishes a relationship between the allocatee and the particular good that does not hold between anyone else and that good. The allocative relationship between a particular good and a particular person has been explained in terms of control: a good is allocated to a person if the good is subject to the allocatee’s control (or, sometimes, to her ‘will’).⁸ However, the notion of ‘subjection to control’ is not itself transparent and the need for precision is clear if we bear in mind how little effective control people have over the fate of goods allocated to them. The notion of ‘control’ overstates the position of an allocatee, whose allocation is subject to vicissitudes that are often entirely beyond her control.

The notion of ‘control’ that is relevant for my argument attempts to capture the allocatee’s *normative position (or positions)* in relation to the allocated good. The normative ‘pairing’ that allows for the relevant kind of control takes the *form* of a bundle of Hohfeldian normative positions (claim-rights, liberties, powers, immunities, and their correlatives).⁹ Now, normative positions primarily relate a certain *person* to

⁸ See, for instance, Waldron’s definition of a “property system” in J Waldron, *The Right to Private Property* (1988) 31 ff; Thomas Gray (*inter alia*) notes that this is what is ordinarily meant by “property” T Gray, “The disintegration of property” (1980) 22 *Nomos* 69 at 69-70.

⁹ W Hohfeld, “Some fundamental legal conceptions as applied in judicial reasoning” (1913) 23 *Yale LawJ* 16 and W Hohfeld, “Fundamental legal conceptions as applied

a given *action* (as “due”, “permitted”, etc) and not directly to a given good. To state that the allocation pairs a person to a good is just shorthand for saying that the allocatee (i) has a number of liberties to act in certain ways towards a particular good (say sitting on it or carrying it around); and, (ii) has a number of claim-rights that others do (or abstain from doing) certain things in relation to the good (e.g. destroying it). Hence, at the ground floor, the normative relationship between the person and the good is a bundle of normative positions connecting persons (including, but not limited to, the allocatee) to “actions” which are allowed, prescribed or forbidden *vis-à-vis* certain goods.

What brings those positions together is the fact that, taken as a bundle, they create a normative space within which the allocatee is entitled exercise control over the particular good. Writing specifically about the kind of allocation that takes the form of private property, Larissa Katz has defended the idea that the owner has an ‘agenda-setting’ normative power in relation to the object of the property right.¹⁰ The bundle of normative positions builds up to a resulting normative position in which my decisions about the destination to be given to the good prevail over anyone else’s decision. That is not to say that others are not allowed to decide over certain aspects of the good, but their decisions have to “fall in line” with the allocatee’s decision.¹¹ So even if others have one or more advantageous normative positions in relation to the good (my tenant has, for instance, a claim-right against me that I do not interfere with his enjoyment of my property, as well as many liberties in relation to the use of the good), the destination to be given to the good is ultimately predicated on my decisions as the owner¹².

in judicial reasoning" (1917) 26 Yale LawJ 710. Later both essays were made into a book W Hohfeld, *Fundamental Legal Conceptions* (1923). The literature on Hohfeldian positions has mushroomed in the past few decades. Deserving of special mention are M H Kramer, “Rights without trimmings” in M H Kramer, N E Simmonds and H Steiner (eds), *A Debate over Rights: Philosophical Inquiries* (1998) 7–111 and L Duarte d’Almeida, “Fundamental legal concepts: the Hohfeldian framework” (2016) 11 Philosophy Compass 554–569.

¹⁰ L Katz, “Exclusion and exclusivity in property law” (2008) 58 UTorontoLJ 275.

¹¹ Katz at 297.

¹² Although the paradigmatic case of an allocation is a property-type legal position, the idea of agenda-setting can be expanded beyond the confines of property law to capture control over other significant patrimonial goods, such as the personal

An allocation is, therefore, a normative position that results from a bundle of discrete normative positions. That resulting normative position is an *exclusive liberty*. In Hohfeldian terms, the allocatee has a *liberty* to set the agenda for the good (that is to say, the allocatee does not have a duty not to set the agenda for the particular good). That liberty is *exclusive*, in the sense that everyone else is under just such duty to not act so as to make their decisions prevail over the allocatee's decisions on that particular matter (and the allocatee has the corresponding claim-right). The allocatee's position also includes a *power*, as each agenda-setting decision by the allocatee changes the normative landscape of others (their liberties and powers to decide about the good might be restricted and/or expanded by the allocatee's agenda-setting decisions). The existence of these Hohfeldian positions constitutes an area of exclusivity for the allocatee¹³ in the sense of creating for them (and only for them) a protected agenda-setting position.¹⁴ Exclusivity, in this sense, is the touchstone of allocations.

It is important to remark at this stage that the allocation of particular goods to particular people is contingent on the occurrence of particular events, regardless of whether such allocation is thought of as a moral normative position or as a legal normative position. A moral theorist such as Nozick or, more controversially, Locke,¹⁵ would have the moral allocation be contingent on facts such as the mixing of the allocatee's labour with a particular object or the occurrence of a particular transaction between the allocatee and whoever had the power to transfer the allocated good.

A legal allocation, on the other hand, depends on the contingent fact of a *positive* allocation. By "positive" here I simply mean that the allocation was

normative positions I have against a bank in relation to monetary value sitting in my current account.

¹³ But not in the "boundary" sense defended by some private property theorists, as the right to exclude others (which correlates to the duty others have not to interfere with the allocation), and which finds a paradigmatic instance in J Penner, *The Idea of Property Law* (2001) at 68-74.

¹⁴ On the distinction of the two kinds of "exclusivity" approaches see Katz at 279-295.

¹⁵ R Nozick, *Anarchy, State, and Utopia* (1974) 151-182; J Locke, *Second Treatise of Government* (1690) chapter V, especially §§ 27-28.

produced, directly or indirectly, by someone's action. A positive allocation might be carried out either by means of a single allocative decision (e.g. a medieval lord bestowing a measure of control over land to a vassal) or by means of a general positive rule (such as the roman rule of *specificatio*, according to which the creation of a new object creates a legal allocative relationship between the creator and the object created). Note that such general legal rules might produce the allocation regardless of any official declaration to that effect. If I create something new in a system that contains general rules about property acquisition by *specificatio* (or similar), it is often the case that the new object is allocated to me regardless of any official declaration to that effect by a public official.

There are many advantages in having the law allocate goods to you. In modern legal democracies, it often means that the state (and its power) will back your decisions about the allocated good by words and deeds. Even in the absence of state-force backing to private rights it is not difficult to imagine the advantages of being allocated a good.¹⁶ Moreover, awarding such legal advantages to private individuals might be objectively valuable as a means to generate states of affairs that could be conceivably achieved by other means (say, achieving environmental equilibrium, or the better preservation of existing social goods). That sort of instrumental value is not, however, the one that concerns me here. What matters here is the ways in which positive rules of allocation might be instrumental to achieving a state of affairs that is distributively just. In order to see the different ways in which positive allocations can be instrumentally valuable to that end, we need clarity about the *kinds of distributive criteria* that can be used to justify particular allocation schemes.

C. JUSTIFYING ALLOCATIONS

¹⁶ In fact, for most of Roman history the state had only an indirect role in the execution of judgments, as it just "authorized the successful plaintiff to pressurize the defendant into complying with the judgment - a form of regulated self-help, the onus being firmly on the plaintiff to obtain satisfaction." See P du Plessis, *Borkowski's Textbook on Roman Law*, 4th edn (2015) 70.

There is nothing necessary about the existence of positive allocations.¹⁷ In fact most, if not all, political communities are organized in such a way that many goods are not allocated at all: public parks, the air we breathe, and public roads are all perfectly mundane examples of goods that are not allocated to anyone in particular. The kinds of reasons in favour of allocating goods to individuals within a community are familiar. Some, like Aristotle's argument that goods held in common are not cared for as efficiently as goods held in private¹⁸ are consequentialist, while others, like some distributive justice arguments, centre on the importance of recognizing differences between the relative 'merits' of people by allocating goods differently. These arguments do not necessarily concern the best criteria for the allocation of the relevant goods, but simply whether or not a particular good or type of good should be allocated at all.¹⁹ Such arguments do not bear directly on the problem I am trying to address in this paper. By contrast, understanding the kinds of criteria that are claimed to be able to justify particular positive allocations is a central part of my argument.

Moral and political philosophers have championed a wealth of such criteria over the centuries. "To each according to his need";²⁰ "all goods should be allocated equally, unless an unequal allocation works in favour of the least advantaged members of society";²¹ or "to which all the previously unowned goods with which her

¹⁷ There is one sense of 'necessary' in which positive allocations would qualify as such: for Kant, leaving the state of nature to enter the civil condition (thus necessarily allocating objects by omnilateral will) is "objectively necessary." (I Kant, *Metaphysics of Morals* 6:264). But this necessity is a requirement of practical reason and, hence, it manifests itself as a *duty*, not as a fact. A recent account and defense of that move has been advanced in E Weinrib, "Private law and public right" (2011) 61 *UTorontoLJ* 191 and, with a more exegetical flavor, in E Weinrib, *Corrective Justice* (2012) 263-296. I will come back to this argument below in section D.

¹⁸ Aristotle, *Politics* 1263a. This argument for allocating goods is grounded on a thesis that foreshadows the "Tragedy of the Commons" family of arguments which was triggered by G Hardin, "Tragedy of the commons" (1968) 162 *Science* 1243.

¹⁹ Within the Aristotelian tradition it is possible to distinguish neatly between the problems of whether a good should be allocated and of who a good should be allocated to, as each question would fall naturally within different aspects of justice (respectively, general justice and particular justice). Aristotle, *Nicomachean Ethics* 1130b6-1132b21

²⁰ K Marx, "Critique of the Gotha Programme", in *Marx/Engels: Selected Works in One Volume* (1968) 325.

²¹ This formulation is meant to capture part of Rawls's second principle of justice in J Rawls, *A Theory of Justice* (1971) 60.

labour is mixed”²² are just some among a myriad of criteria that have been proposed to justify allocations of particular goods to particular individuals. Complex theories of justice will often articulate different such criteria, establishing divisions of labor and hierarchies between them.

Regardless of how they are articulated, the chief criteria within each conception of justice fall within two broad kinds. Criteria of the first kind are “bound” to one particular allocation scheme, which means that they are only able to justify one set of particular pairings between persons and goods. Criteria of the second kind, on the other hand, might be able to justify a number of different particular sets of pairings between persons and goods, provided each such set of pairings meets certain requirements. I will be referring to justificatory criteria belonging to the first kind as “bound” and to justificatory criteria belonging to the second kind as “unbound”. In the remainder of this section I intend to refine and explicate the distinction between the two kinds of criteria.

A paradigmatic example of a bound criterion to justify allocations is Nozick’s entitlement theory of justice in holdings.²³ Nozick’s model is predicated on a combination of two principles: (i) the principle of justice in acquisition and, (ii) the principle of justice in transfers.²⁴ Nozick is very brief in his discussion of the first principle and appears to subscribe to Locke’s “labour” theory of property acquisition²⁵ (although it is not entirely clear that Locke himself would have subscribed to such use of the labour theory).²⁶ However close the relation between Nozick’s principle of justice in acquisition and Locke’s labour theory of property might be, it is clear that Nozick thinks of the principle of acquisition as being able to

²² This formulation is meant to capture the labour theory of property acquisition, when it is put to a justificatory (not mere aetiological) use (see note 25 below).

²³ As presented in R Nozick, *Anarchy, State, and Utopia* (1974) 151-182.

²⁴ Confusingly, Nozick then adds a third principle of “rectification of injustice” which comes into play when the first two principles are violated. Nozick (1974) 152-153.

²⁵ Although this is not entirely clear from his discussion of Locke, where he expresses some discomfort with the idea of labour-mixing. See Nozick (1974) 174-182.

²⁶ It is possible that Locke only had in mind an aetiological or foundational approach, but accepted by “*Compact and Agreement*” communities might have to *settle the property* which Labour and Industry began” (J Locke, *Second Treatise on Government* §45). This aetiological reading of Locke was plausibly defended in M Kramer, *John Locke and the Origins of Private Property* (1997) 143-144.

identify a class of historical facts which would justify the allocation of a particular good to a particular person. If he is indeed a subscriber of some version of the labour theory, the principle would state something like “[w]hatsoever, then, he removes out of the state that Nature (...) he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property”.²⁷ The principle of transfers establishes the conditions under which changes in a distribution purely based on the principle of acquisition are acceptable. Although Nozick opts for not spelling out in detail the content of the principle of justice in transfers,²⁸ the principle is clearly meant to cover paradigmatic forms of voluntary transfer of a particular good such as a gift or a sale of goods.

What results is a criterion to justify allocations that is, in his words, *historical*: “whether a distribution is just depends upon how it came about”.²⁹ What that means is that, if one knows (a) the criteria that justify acquisition and transfer and, (b) the relevant facts (on the one hand, who mixed labour with what and, on the other, the “ledger” of justified transfers), one should be able to determine what precisely should belong to whom. Nothing else is needed. In particular, there is no need for additional criteria to be drawn from either further moral reasons or positive acts of allocation in order to identify the particular pairings between each person and each good.

The same cannot be said about allocation-unbound justificatory criteria to the allocation of goods. Such criteria do not identify the *particular* goods to be allocated and the *particular* persons that are going to receive each good. These justificatory criteria might be satisfied by many different (and mutually incompatible) allocative arrangements as they only specify that goods belonging to a certain class or possessing a certain property are to be allocated to people belonging to a certain class or possessing a certain property.

Theories of distributive justice that put forward allocation-unbound criteria are legion but, partly for that reason, the best way to explain how they can be all

²⁷ J Locke, *Second Treatise on Government* §26.

²⁸ R Nozick (1974) 153. The insufficiency of Nozick’s account of the transfer principle and its upshots are discussed in G Cohen, *Self-Ownership, Freedom, and Equality* (1995).

²⁹ R Nozick (1974) 153.

considered somehow incomplete is not to go through each of them. Instead, in what follows, I illustrate their insufficiency by introducing a hypothetical scenario in which allocation-unbound criteria are utilized.

At the end of the school year, I promise my two children to give each of them a present in acknowledgement of their excellent performances in their respective school plays. Dutifully, on Saturday morning, I walk them to a toyshop and I now need to decide how the toys are going to be allocated to each child.

One kind of criterion that I might plausibly adopt to decide on the appropriateness of the allocations is that each of the children can have one toy from a particular class, say a puzzle. If that criterion is all I have to go about pairing each child with a toy, I have no criteria that would allow me to determine which specific puzzle should be allocated to which particular child. Even if there are only two identical puzzles in the shop, in the absence of further criteria there is no way to decide which child should have which of the identical puzzles. All the criterion gives us is the characterization of a class of goods (puzzles) and of children (my children), but the set of characteristics identified are unhelpful in matching a puzzle to a child. Call these “class-based” distributive criteria.

Another kind of allocation-unbound criterion I might use (one that is very popular in contemporary theories of justice) places the justificatory criteria one step further removed from the actual goods to be allocated. In allocating toys among my children during our visit to the toyshop I might establish that a toy-child pairing would be justified only if each toy given to each child has the same value (perhaps qualified by the prudential proviso that they should be worth less than £10). This sort of strategy is predicated (i) on the identification of a *scalar property* common to the relevant objects (say, their “market value”) and, (ii) on a comparison of the relevant items regarding where they sit on the relevant scale (e.g. the market value of item X might be £5 and the market value of item Y might be £9), thus yielding a result (in our example, the conclusion that that assigning X to one child and Y to the other is not justified). Call these “property-based” criteria.

Property-based criteria present the same insufficiency we saw above in relation to the class-based criteria: assuming that there is more than one object or

combination of objects that sits at the precise point of the scale that would make the allocation justified, it would be impossible to determine which specific object should be allocated to which particular person. In our example even if there are only two toys that possess the same market value (say a puzzle worth £9 and a board game also worth £9), the criterion would not be sufficient to determine which child should have which toy.

Thus, the many theories of distributive justice that put forward property-based criteria for apportioning wealth are predicated on allocation-unbound, criteria. Such criteria are neutral regarding which good should be allocated to which individual and, as a result, there are many conceivable particular allocative arrangements that would be justified by the same criteria. If the criteria of allocation between my children is either class-based or property-based, there are different particular toys whose allocation to the children would satisfy the criteria, but which would be mutually exclusive.

In the past few paragraphs I have qualified allocation-unbound criteria for evaluating distributions as “somehow incomplete” and as “unhelpful”. This language might give the impression that distributive justice theories that give pride of place to such criteria are themselves incomplete or unhelpful so that either they need to be changed in such a way that they specify how precisely goods should be allocated or else they need to be abandoned in favour of allocation-bound theories of distributive justice. It is important to clarify that that is not what results from the analysis above. All that follows from this incompleteness is that when using allocation-unbound criteria to justify the pairing between a particular person and a particular object, a necessity arises that does not arise with regard to allocation-bound criteria.³⁰ Puzzles, as well as shares in wealth and purchase power, cannot be allocated in the abstract. Shares in both wealth (and other such properties of goods) and in good-types only

³⁰ That feature of allocation-unbound theories does however create a *pro tanto* reason to favour allocation-bound theories grounded on the value of parsimony or simplicity in philosophical theories. As Aristotle put it: “Let that demonstration be better which, other things being equal, depends on fewer postulates or suppositions or propositions.” (Aristotle, *Posterior Analytics* 86a34-35). Needless to say, my argument is that this *pro tanto* reason is easily outweighed by considerations in favour of allocation-unbound criteria.

ever materialize in the allocation of particular goods to particular people. If the distributive criteria do not themselves do the pairing job, one should ask what else might be able to do it. That does not mean, of course, that there is something wrong with the criteria or with the distributive justice theory that utilizes it. It just means that such distributive justice criteria cannot perform both a *justificatory job* and a *pairing job* and that, as a result, the *pairing job* has to be outsourced for us to be able to apply unbound criteria of distributive justice.

It is important here to be clear about the nature of this necessity. The more straightforward way to clarify this is to ask what is lost if one cannot determine the particular pairings between goods and individuals. Perhaps the main reason why one might worry about whether or not a certain state of affairs qualifies as distributively just is the fact that, from this qualification, *pro tanto* reasons to bring about this state of affairs (or to act in such a way as to preserve it) follow. But an allocation-unbound criterion to justify allocations underdescribes the state of affairs that one has a reason to bring about and/or protect. There are numerous pairings that would be *in themselves* perfectly acceptable according to criteria of this kind. In fact virtually all pairings of a particular object with a particular member of the relevant group would be acceptable. Moreover, most particular pairings the criteria justify are mutually incompatible. If one of the main deliverables of a theory of distributive justice is to guide action by generating *pro tanto* reasons, such theories would have failed by underdescribing the action that needs to be performed. Herein lies the importance of identifying suitable ways to carry out the pairings. I turn to that question in the next section.

D – HOW TO PAIR PARTICULAR PEOPLE TO PARTICULAR GOODS

The story used in the previous section in order to introduce allocation-unbound distributive justice criteria might lead one to believe that pairing is an easy enough affair. After all, I might quickly decide which of the identical puzzles goes to each child (in my first example) or perhaps I can outsource the decision to the children themselves. Whatever toy they happen choose within the parameters I gave them would give me a reason to bring the particular allocation about. That strategy, in turn, seem to be grounded on sound arguments about respecting my children's autonomy and on the pedagogy of freedom (i.e. that one learns to be free by acting freely). But

however easy these solutions might be to envisage and justify, they are still predicated on the need for a positive decision (mine or my children's) in order to bring about the pairing.

But perhaps I do not need such positive decisions. Perhaps moral reasons other than those embodied in the justificatory criteria (or even prudential reasons), can be sufficient to establish which particular pairings are justified. In the toyshop scenario, I might pair each child with the particular good they grabbed first and that might be justified in terms of expediency, cost-efficiency, fairness or a combination of these and other normative considerations. And if this still seems to be dependent on a certain decision (by the children about taking possession of particular toys), there are certainly other such considerations that would not be so. The fact that one child loves a particular and unique puzzle above all other toys (of the same kind, or, in property-based criteria, within the relevant price range) is a reason to allocate that particular puzzle to her even if the allocation of another toy (say another puzzle or a magic set) would also fall within the relevant allocation-unbound criteria.

It is not clear, however, whether such reasons would suffice to accomplish the pairing job in most situations, in particular when property-based criteria are to be used at a large scale. It seems even less likely that this will apply to all goods and to all people and, in any case, the transaction costs of making such a determination might be prohibitive, so that there would be both moral and prudential reasons compelling us to find another way to discharge the pairing job.

Thankfully, moral reasons are not the only resource available to us for pairing particular goods to particular people. Positive law is able to do just the same. In fact, that is a crucial difference between the value of positive law with regard to, on the one hand, allocation-bound criteria and, on the other, allocation-unbound criteria for the justification of allocations. Before we move on to the question of the value of positive law in relation to distributive justice, let me further specify the claim that positive law is able to discharge the pairing job.

As we saw above, most legal systems include general rules specifying the conditions under which a certain good is to be paired with a certain person. Interestingly, some look similar to criteria proposed by modern philosophers to justify

property in the state of nature. Take the Roman doctrine of *occupatio*, qualified versions of which spread far and wide in Western legal systems,³¹ and according to which an ownerless object that is susceptible to private ownership would be the property of the first person to take possession of it. In the *Metaphysics of Morals* Kant elaborates on why occupation is indeed the primary form of land property acquisition.³² The Civilian doctrine of *specificatio*, in turn, looks very much like an instantiation of Locke's labour-mixing of property, discussed above.

What precisely this set of positive rules is varies across different legal system and, in fact, there are very different pairing criteria at play across different legal traditions. The Roman rule of *specificatio* fared well in most Civilian systems and in some mixed legal systems, such as Scotland.³³ It has not fared equally well in the common law.³⁴ In addition, as mentioned above, some of those rules are self-applying, while others require some sort of official recognition. In spite of this latitude that allows for different pairing criteria to be adopted by a particular positive legal order, they all share a particular property: their ability to match particular people to particular goods.

Although a pairing could be produced by a mere decision by anyone to the effect that a particular good is to be allocated to a particular individual, there are some additional advantages on pairing through positive legal rules and decisions from the point of view of distributive justice. The pairings that law produces are more effective, in the sense that members of the community are likely to take the allocation seriously by, for instance, behaving in a way that is compatible with the allocation having happened (e.g. refraining from interfering with the allocatee's control of the

³¹ To name but a few, *occupatio*-type provisions can be found in the Civil Codes of Brazil (art 1263), France (art 715), Germany (art 956), Italy (art 923), Portugal (art 1318). In Scotland the doctrine, in relation to movables, 'seem barely to have shifted from [its] Roman base', as in K Reid, "Property Law Sources and Doctrine", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) 185-219 at 193. In the common law, the doctrine of capture has been used to similar effect, although there are instances in which capture is applied in a way that is closer to the Lockean labour theory of acquisition, as in the manure appropriation case decided by the Connecticut Supreme Court (*Haslem v Lockwood* 1871 506).

³² I Kant, *Metaphysics of Morals* 6:258-6:260

³³ K Reid (n30) at 192-3

³⁴ P Matthews, "'Specificatio' in the common law" (1981) 10 *Anglo-American LR* 121-128.

object). Furthermore, if and when law is able to produce authoritative reasons for action, there will be reason to prefer a particular set of pairing rules and decisions to any other possible set of positive rules and decisions. So positive allocations produce generally efficacious, potentially authoritative rules and decisions that are able to pair particular goods to particular people. In doing so, law provides a focal point that allows agents to coordinate their attempts to bring about or protect a set of allocative pairings that are deemed to be justified by allocation-unbound distributive criteria.

With the idea of allocation, the separation of kinds of distributive criteria and the identification of a role for positive rules of allocation in relation to the class-based and property-based justificatory distributive criteria, we are now in a position to get back to the question of how precisely are private law allocation rules instrumentally valuable *vis-à-vis* distributive justice.

E. THE VALUES OF PRIVATE LAW INSTITUTIONS

As stated in section A, my aim in this article is to identify different ways in which legal allocative criteria are valuable for the sake of something else that exists independently of them: the realization of distributive justice. One of the ways in which something can be valuable “for the sake of something else” is for it to be instrumentally valuable.³⁵ Something is instrumentally valuable if it possesses one or more properties that make(s) it conducive to the existence of something else that has final value.³⁶ The paradigmatic case of instrumental value is one in which there is a causal connection between the valuable instrument and the finally valuable state of

³⁵ There are other ways in which something can be “valuable for the sake of something else”. Something might be valuable, for instance as a symbol of something else, without being itself conducive to the thing that possesses final value. See, *inter alia*, D Dorsey, “Can instrumental value be intrinsic?” (2012) 93 *Pacific Philosophical Quarterly* 137–157; B Bradley, “Extrinsic value” (1998) 91 *Philosophical Studies* 109–126.

³⁶ This aspect of instrumental values is common in both “usages” of the expression identified by T Rønnow-Rasmussen (i.e. the strong and the weak). Needless to say, that I am taking this to be a necessary, but am making no claim as to whether this is a sufficient, condition for something for possess instrumental value. T Rønnow-Rasmussen, “Instrumental values – strong and weak” (2002) 5 *Ethical Theory and Moral Practice* 23–43 at 25.

affairs. In fact, the literature on instrumental value sometimes identifies the relation of instrumentality with causal relations. In the much-quoted passage of *Principia Ethica*, which structured the contemporary philosophical debate on value, G Moore identifies instrumentality with causality:

Whenever we judge that a thing is “good as a means,” we are making a judgment with regard to its causal relations: we judge both that it will have a particular kind of effect, and that that effect will be good in itself.³⁷

This is one way in which legal allocation rules might be instrumentally valuable *vis-à-vis* a state of affairs that is distributively just. There is, however another way in which the instrumentality relationship obtains, one that cannot be easily assimilated to a causal relationship between an action and a just state of affairs.

In order to show the difference between the two types of instrumental value, let me start by addressing the simpler question of how instrumental value supervenes on private law’s positive allocative rules, with regard to a state of affairs that is distributively just according to a theory of distributive justice predicated on allocation-bound justificatory criteria. The role played by positive law’s own allocative criteria in relation to such a conception of distributive justice is primarily instrumental in the causal sense. Here the just state of affairs is fully determined by the justificatory criteria and, hence, the central task of legal rules is to help bringing such state of affairs into existence (i.e. to help the right individuals to set the agenda for the particular goods they are paired with). Positive legal rules about allocations might help by playing a part in bringing the state’s coercive apparatus to back each just allocation, or by establishing mechanisms to create a track record of the relevant transactions, or by signaling to other members of the social group which goods should have their agenda set by others. This value supervenes on a particular feature of legal rules about allocation, namely, their *ability to causally contribute to the protection of just allocative pairings*.

This causal instrumental relation is what both theorists that defend a conception of private law in which it should be conceived as having final value and theorists that defend that private law should be conceived as having instrumental

³⁷ G Moore, *Principia Ethica* (1903) § 16, 22.

value have chiefly in mind. Regardless of who should carry the day in this battle for the soul of private law, there are other parts of private law (like the law of delict (torts) and the law of unjustified enrichment) which might also possess the *ability to causally contribute to the protection of just allocative pairings*.³⁸ So the possession of this property is not exclusive to legal rules of allocation.

Although the possession of this property might be the only thing that makes such rules, doctrines and concepts valuable in relation to allocations justified by allocation-bound criteria, it does not follow that they are only causally instrumental in relation to such conceptions of distributive justice. These rules, doctrines and concepts' *ability to causally contribute to the protection of just allocative pairings* can be causally instrumentally valuable also in relation to allocations-unbound conceptions of distributive justice. So, regardless of the kind of theory of distributive justice one adopts, private law rules of allocation (as well as any rules in the law of obligations and elsewhere) can be valuable in a causal instrumental way.

In relation to conceptions of distributive justice that are predicated on allocation-unbound justificatory criteria, however, they perform an additional role and, accordingly, are instrumentally valuable in a different way. As we saw above, such justificatory criteria, in both its variations (class-based and property-based) are unable to perform the pairing of particular goods to particular people. In relation to them, positive allocations' rules and decisions perform another role: *they allocate*. They *produce* the allocations (the pairings between particular persons and particular goods) without which the justificatory criteria could not be satisfied. They constitute the allocative relationships that allocation-unbound criteria evaluate. Their value supervenes on a property they possess which is not the same property that might make them causally instrumentally valuable, namely, their *ability to allocate*. Positive law

³⁸ This is a point made by some theorists of justice in relation to the connection between distributive and corrective justice (by which they often mean precisely the basic structure of tort law and, sometimes, of unjustified enrichment law). The latter is vindicated by its ability to help realize the former. See, for instance, J Gordley, "The moral foundations of private law" (2002) 41:1 *American Journal of Jurisprudence* 1-22 at 3 and W Sadurski, "Social justice and legal justice" (1984) 3 *Law and Philosophy* 329-354 at 334-346.

constitutes the *object* whose value is assessed by the non-self-applying allocation-unbound criteria of distributive justice.

As we saw above, this ability to produce the pairings is instrumental to sorting the problems generated by the inherent underdeterminacy of allocation-unbound justificatory criteria and, in doing so, they allow for distributive justice to generate *pro tanto* reasons for action, thus fulfilling what can be safely considered to be one of the desiderata of any theory of distributive justice. This sort of instrumental value is not merely *causal* (although it might also be so), in the sense that the value of the particular state of affairs that it contributes to is at least in part explained by the legal rules of allocation. An alternative explanation to that way to be valuable might see it not so much as an instrumental value, but rather the kind of extrinsic value that a part might have in relation to the whole.³⁹ If you take the whole to be the complete set of criteria that determine all the allocations that are distributively just in a given social group, the legal rules we have been discussing in this article would constitute part of the set of criteria.

In both analyses (non-causal instrumental value or extrinsic value as a part) the way in which such rules are valuable in relation to distributive justice is not the same way in which they might be valuable as a result of causing a distributively just state of affairs to come into existence.

So there we have it: one kind of positive private rule (legal rules of allocation), one object with final value (the realization of distributive justice in the allocation of goods), two kinds of instrumental value (the “instrumental-causal” and the “instrumental-constitutive”), grounded in two separate properties possessed by those rules (the *ability to causally contribute to the protection of just allocative pairings* and the *ability to allocate*). So the answer to the question I posed as the title of this article is more subtle and nuanced than it might have first appeared. A set of traditional positive rules of private law do something of immense value for distributive justice:

³⁹ The literature on value has identified different kinds of “extrinsic” value, amongst which are the instrumental value, the symbolic value, and the value something might have as part of a whole. See B Bradley (n34) at 110 and B Bradley, “Instrumental Value”, in H LaFollette, *The International Encyclopedia of Ethics* (2013) 2638–2640 at 2638.

not only can they contribute causally to bring about the desired distributively just state of affairs, they are also constitutive of such states of affairs, as they perform the pairing job that is conceptually required in order to apply allocation-unbound criteria of distributive justice.